UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

REGION 6
Dallas, Texas

IN THE MATTER OF:	)	
	)	
HERMAN ROBERTS	)	
	)	
	)	
RESPONDENTS	)	DOCKET NO. 99-512
	)	
	)	
	)	

ORDER DENYING COMPLAINANT'S MOTION FOR DEFAULT ORDER

I. BACKGROUND AND PROCEDURAL HISTORY

On August 17, 1999, the Complainant filed an Administrative Complaint and Opportunity to Request Hearing and Conference (Complaint) against the Respondent, alleging violations of the Clean Water Act, as amended by the Oil Pollution Act of 1990. The Complaint sought a $27,500 civil penalty. However, the Respondent did not file an answer. On February 11, 2000, the Presiding Officer issued an Order to Show Cause, requiring the Complainant to file proof of service of the Complaint by February 25, 2000, or show cause why the Complaint should not be dismissed without prejudice for failing to complete service. If the Complainant filed proof of service, it was also ordered to file a motion for a default order by March 17, 2000, or show cause why the Complaint should not be dismissed for lack of prosecution.[(1)]

The Order to Show Cause was issued because almost six months had passed since the Complaint was filed, and the Respondent had not filed an answer. Furthermore, proof of service of the Complaint had not been filed with the Regional Hearing Clerk, as required by 40 C.F.R. § 22.5(b)(1)(iii). Thus, there was no proof that service of the Complaint had been completed.[(2)] The Complainant also

had not filed a motion for a default order. The Presiding Officer could not, sua sponte, find the Respondent in default for failing to file an answer. The Presiding Officer noted that unless some action was taken by the Complainant, this case could remain on his docket indefinitely.

On February 16, 2000, the Complainant filed the return receipt green card for the Complaint. On March 17, 2000, the Complainant filed a Motion for Default.[(3)] The basis for the default motion is that the Respondent has been properly served with a copy of the Complaint, and has failed to file an answer to the complaint or request an extension of time to file an answer. The Complainant requests that the Presiding Officer find that the Complaint states a cause of action, that a default has occurred, and therefore enter an order of default against the Respondent. The Complainant did not seek a default order requesting the assessment of civil penalties against the Respondent.[(4)]

II. DISCUSSION

40 C.F.R. § 22.17 provides the following:
(a) *Default*. A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint; upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; or upon failure to appear at a conference or hearing. Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations. . . .
(b) *Motion for default*. A motion for default may seek resolution of all or part of the proceeding. Where the motion requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested.

As a preliminary matter, the Complainant must prove that the Respondent was properly served with a copy of the Complaint. Proof of service is required to be filed with the Regional Hearing Clerk *immediately*upon completion of service, not six months later. 40 C.F.R. § 22.5(b)(1)(iii) (emphasis added). For a complaint served by certified mail, return receipt requested, proof of service would be the return receipt green card. On

February 16, 2000, the Complainant filed the return receipt green card (Return Receipt) for the Complaint. The Return Receipt shows that the Complaint was signed by Kenneth Liegler (sp?) on August 25, 1999, not the Respondent Herman Roberts. Therefore, the question becomes whether the Complaint was properly served on the Respondent.

40 C.F.R. § 22.5(b)(1)(i) provides the following:

> Complainant shall serve on respondent, or a representative authorized to receive service on respondent's behalf, a copy of the signed original complaint, together with a copy of these Consolidated Rules of Practice. Service shall be made personally, by certified mail, return receipt requested, or by any reliable commercial delivery service that provides written verification of delivery.

Thus, 40 C.F.R. § 22.5(b)(1)(i) authorizes service by certified mail, return receipt requested. In *Katzson Brothers, Inc. v. U.S. EPA*, the Court stated:

> The mails may be used to effectuate service of process if the notice reasonably conveys the required information and affords a reasonable time for response and appearance. Due process does not require actual notice. If an agency employs a procedure reasonably calculated to achieve notice, successful achievement is not necessary to satisfy due process requirements.

839 F.2d 1396, 1400 (10th Cir. 1988) (internal citations omitted).

In this case, the envelope containing the complaint was addressed to the Respondent at the Respondent's business address, a post office box.[(5)] Thus, someone associated with the Respondent's business had to go to the post office and sign for the envelope containing the complaint, since it was sent by certified mail, return receipt requested.[(6)] Because this person had the authority to collect mail for the Respondent, he or she would be responsible for ensuring that all mail addressed to the Respondent would actually be delivered to the Respondent. To hold otherwise would hinder service of process on individuals by certified mail. See *Katzson Brothers, Inv. v. U.S. EPA*, 839 F.2d at 1399. Thus, the Presiding Officer believes that under the facts of this case, the procedures used by the Complainant satisfy due process, and service of the Complaint has been achieved in accordance with 40 C.F.R. § 22.5(b)(1)(i).[(7)]

Turning to the Complainant's default motion, the Respondent failed to file a response to the Complainant's default motion, and thus is deemed to have waived any

objection to the granting of the motion. 40 C.F.R. § 22.16(b). In addition, the Respondent's failure "to admit, deny or explain [the] material allegations in the complaint constitutes an admission of the allegation[s]." 40 C.F.R. § 22.15(d). However, "default orders are not favored, and doubts are usually resolved in favor of the defaulting party."*In Re Rybond, Inc.*, 6 E.A.D. 614, 616 (1996). Therefore, the Complainant's motion must be analyzed on the merits. *See In the Matter of Billy Yee*, 1999 WL 1201417 (EPA November 8, 1999); *In the Matter of Mr. C.E. McClurkin*, Docket No. VI-UIC-98-001, slip op. at 9 (February 10, 2000).

The Complainant asked the Presiding Officer to determine whether the Complaint states a cause of action. Although the Presiding Officer does have the authority to determine on its own whether a prima facie case has been pled in the Complaint, he believes that its more appropriate for the Complainant to make this showing. Since the Complainant has the burden of proving a prima facie case on liability by a preponderance of the evidence, the Complainant can and should make this showing in its motion for a default order. *See In the Matter of Donald Haydel*, CWA Docket No. VI-99-1618, slip op. at 5 - 6 (April 5, 2000); 63 Fed. Reg. 9464, 9470 (February 25, 1998).[(8)]

The Presiding Officer previously determined that the Complaint was properly served. A review of the Regional Hearing Clerk's file shows that the Respondent has failed to file an answer. Therefore, I find that the Respondent is in default, and thus admits all facts alleged in the Complaint and waives its right to contest such factual allegations. 40 C.F.R. § 22.17(a). However, the Complainant failed to show in its motion that it pled a prima facie case in its Complaint. Thus, I find that good cause exists for not entering a default order. *See* 40 C.F.R. § 22.17(c).[(9)]Therefore, the Complainant's motion for a default order is denied. The Complainant is therefore **ORDERED** to file another motion for a default order in accordance with this Order by **May 1, 2000. This motion shall include a motion for a default order on penalties. The Complainant is strongly advised to review the Presiding Officer's recent decision in the *Donald Haydel* case listed above before filing its motion for a default order.**[(10)]

Dated: 4/14/00 /S/_____
Evan L. Pearson
Regional Judicial Officer

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of April, 2000, I served true and correct copies of the foregoing Order Denying Complainant's Motion for Default Order on the following in the manner indicated below:

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

_____

Herman Roberts
P.O. Box 300
Beggs, Oklahoma 74421

INTEROFFICE MAIL

Edwin M. Quinones
Assistant Regional Counsel (6RC-S)
U.S. EPA - Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

Dated: /S/_____
Lorena S. Vaughn
Regional Hearing Clerk

1 This Order was sent to the Respondent by certified mail, return receipt requested. However, the Order was returned to the Regional Hearing Clerk by the United States Postal Service as "unclaimed".

2. The certificate of service for the Complaint states that it was sent to the Respondent by certified mail, return receipt requested on August 17, 1999. However, for purposes of proving service, this is insufficient by itself to show that the Respondent received the Complaint. 40 C.F.R. § 22.5(b)(1)(iii).

3. It should be noted that Mr. Edwin Quinones filed the Motion for Default, whereas Ms. Amy McGee was identified as the attorney for the Complainant in the Complaint. In the future, the correct procedure would be for Mr. Quinones to file a Notice of Substitution of Counsel (if he is going to replace Ms. McGee as the Complainant=s attorney), or a Notice of Appearance (if he is going to assist Ms. McGee). This would ensure that the proper person receives service of the Presiding Officer=s decision.*See* 40 C.F.R. § 22.5(c)(4).

4. Although not specifically stated in the Order to Show Cause, the Presiding Officer assumed that the motion for default would include both liability and penalty issues. Although the Complainant is allowed to seek a default order just on liability, the Presiding Officer recommends in the future, for the sake of judicial economy, that the Complainant seek resolution of all issues in a motion for a default order.

5. Complaint ¶ 3; Return Receipt.

6. It is also noted that the Respondent refused to claim the envelope containing the Order to Show Cause, which was addressed to the same address. *See* footnote 1, *supra*.

7. In the future, the Complainant should make the necessary arguments demonstrating service when it is not readily apparent from the return receipt, rather than just submitting the return receipt green card.

8. The Complainant may have been referring to default procedures under the proposed Part 28 rules, which had the Presiding Officer making the determination on his own that the complainant had stated a cause of action in the complaint. 56 *Fed. Reg.* 29996, 30028 (July 1, 1991).

9. *See Patray v. Northwest Publishing, Inc.*, 931 F. Supp. 865, 869 (S.D. Ga. 1996) (Before a court can enter a default judgment, the complaint must state cause of action); 46 Am Jur. 2d, Judgments § 295 (1994) ("when a valid cause of action is not stated, the moving party is not entitled to requested relief, even on default").
10. This decision is available from the Regional Hearing Clerk, and will be available in the near future on Westlaw, Lexis, and EPA Shadowlaw.

Last Updated: March 2, 2001